Wills for B.C. Farmers

Ministry of Agriculture and Food

85-5631/

BC
AZ2
D:W566
1985
c 3

Wills for B.C. Farmers

Prepared by:
TERRY PETERSON
Supervisor, Farm Business Management
B.C. Ministry of Agriculture & Food

Revised 1984 by

R.J. Herperger
Student at Law

Canadian Cataloguing in Publication Data

Peterson, Terry
Wills for B.C. farmers

Bibliography: p.
ISBN 0-7726-0287-5

1. Wills - British Columbia - Popular works. 2. Estate planning - British Columbia - Popular works. I. Herperger, R. J. II. British Columbia. Ministry of Agriculture and Food. III. Title.

KEB245.Z82P47 1985 346.71105'4'024631 C85-092118-X

TABLE OF CONTENTS

Introduction 1

What is a Will? 3

Reasons for Having a Will 3

Dying Without a Valid Will 4

Changing or Revoking a Will 6

Selecting the Executor 8

Powers and Duties of the Executor 9

Should You See a Lawyer to Prepare a Will? 11

Clauses to be Included in a Will 11

Beneficiaries of Interests in Funds or Plans: Designation by Will 13

Change of Domicile 14

Guardianship of Underage Children in the Event of Marriage Breakup 14

Joint Tenancy vs. Tenancy in Common: The Effect on Wills 15

Contesting a Will 15

Conclusion 16

Glossary of Terms 17

Worksheet to be Used in Preparation of a Will 21

Testator's Checklist for Estate Planning 25

Resources and Agencies 27

Bibliography 29

PREFACE

The management of a farm business includes the development and implementation of a plan to transfer the farm as a going concern to the next generation. The development of a farm transfer plan should begin with discussions within the farm family, the development of a strategy for gradual transfer of managerial responsibilities to the next generation, the development of an organizational structure to allow for the orderly transfer of assets, and the writing of a will to ensure that the manager's personal wishes regarding property and other transfers are carried out.

In response to many enquiries from farm managers about estate planning and specifically about wills, this publication, originally prepared by Terry Peterson, Supervisor of Farm Business Management Programs, Economics Branch, Vernon, has been revised and updated by R.J. Herperger, Student at Law. It is intended to provide basic information on wills for farmers and to outline specific data and information that a farm manager should have available when working with his lawyer on a will.

Another Ministry publication which may assist farmers in this regard is Estate Planning for the B.C. Farmer.

The Economics Branch gratefully acknowledges the assistance of staff members who reviewed this publication. In addition, the Economics Branch acknowledges the guidance and input received from Mrs. L. Griswold, and Mr. C.W. Foote, Public Trustee, both of the British Columbia Ministry of Attorney-General.

A.B. (Sandy) Lauder, P.Ag.
Director
Economics Branch
Victoria, B.C.
March, 1985

Introduction

During the last few years, farmers have seen a need to pay more attention to their financial affairs. This includes an increased awareness of the need for improved financial management, financial planning, business organization and estate planning. Many farmers now find themselves in a position of considerable wealth because of increased capitalization of agriculture in general, as well as the much higher values of their land.

Changing tax laws, like the implementation of a tax on capital gain in 1972, have increased the importance of estate planning. One of the areas of major concern to farmers is transferring the farm to future generations. If this is to be accomplished effectively, with minimum tax implications and family problems, a well thought out and documented estate plan is required.

There are many different methods of transferring farm property to children, such as selling, gifting or bequeathing. Transferring farm assets by means of a will is known as either bequeathing or devising, depending on the type of assets being transferred.

The fundamental document of any estate plan is the will. It has been said that there are two certainties in the world, death and taxes. Yet every year, thousands of people die without having a valid will. Most farmers will come in direct contact with or be affected by a will, but many are unaware of the importance of having a will, or what happens when a person dies without one, thus the necessity of information for farmers on the topic of wills.

Having a valid will is the only method by which a farmer can give personal directions as to how he wants his estate to be divided after his death.

Many farmers are under the misconception that, if they die without a will, their estate will go automatically to their wife. This is not necessarily the case. In British Columbia, the legislation that comes into effect if a person dies intestate (without a will) is called the **Estate Administration Act.** Without a valid will, the farmer cannot determine how his assets are to be divided, as government legislation dictates the distribution of the farmer's assets.

This publication provides relevant information on wills for farmers. It includes information on the requirements of a valid will in British Columbia, the reasons for having a will and the need for periodic updating. The method of changing a will, who to see about preparing a will, and the legal requirements are also discussed. To reinforce the importance of having a will, the implications of dying intestate are discussed in detail.

It cannot be emphasized enough that while anyone can draft a basic will, the necessity of retaining a lawyer increases in direct proportion to the size of a farmer's holdings and his desire to do more than simply leave his estate to his spouse. Tax planning makes a professionally drafted will even more necessary as does the situation where the farm is held as a partnership or where the farming business is incorporated.

This publication seeks to give basic information to the farmer who is contemplating having a will drafted or amended. It seeks to answer some of his questions, questions that otherwise will be answered by a lawyer with the attendant costs. It is not meant to be a "how to" publication. The farmer is urged to retain a lawyer for that purpose.

For a will to effectively provide direction for the division and distribution of the assets of the deceased, it should contain detailed and concise instructions as to how the assets are to be divided. To accomplish this, the will names an executor who is responsible for gathering together the assets, paying the debts and distributing the estate as directed in the will. The characteristics and duties of a suitable executor are discussed, along with the types of clauses which could be included in the will.

What is a Will?

A will is a legal document which outlines and directs how a person's property is to be distributed after death. The legislation in British Columbia that applies to wills is called the **Wills Act**. The person making a will is called the testator (testatrix, if female). However, for ease in understanding, this publication will use only the male form to apply to both male and female terminology. A person who is to receive a gift under the provisions of a will is called a beneficiary. A will can be changed or revoked at any time during one's lifetime, but it only takes effect when a person dies.

In British Columbia, for a will to be legal, it must be prepared in accordance with the **Wills Act**. For a will to be valid it must be signed at the end by the testator in the presence of two witnesses who must sign in the presence of each other. The witness should not be an executor, beneficiary or spouse of the beneficiaries of the estate. If a witness were to receive a gift under terms of the will, the gift would be declared void. It should be noted that the same situation would occur if the spouse of a beneficiary acted as a witness.

A type of will that is legal in some provinces but **not legal in British Columbia** is called a Holograph Will. A Holograph Will, written in the testator's own handwriting, must be signed by the testator.

In most cases, it is advisable to have a lawyer prepare a will as he is aware of the legal implications involved. It is important to farmers to remember that, in British Columbia, a will must be signed and witnessed before it is legal.

In British Columbia, a will can be made by anyone who is 19 years of age, providing he understands what he is doing. If a person is serving in the Armed Forces or is married, he can make a valid will even though he may not have reached the age of 19. In order for the will to be valid, the testator must understand the nature and the consequences of preparing a will. He must be of sound mind and capable of knowing what he is doing when he outlines in writing how he wishes his estate to be divided.

Reasons for Having a Will

The main reason for a farmer to have an up-to-date will is that it provides him with the opportunity to decide and control how his farm and other assets are to be divided after his death. It should be emphasized that both husband and wife should have current wills. A will outlines which beneficiaries are to receive the various gifts. The assets to be transferred under a will are divided into four categories: bequests, legacies, devises and residue.

A **bequest** is a gift under the terms of the will of personal property, such as personal items or shares in a farm company.

A **legacy** is a gift of cash of a fixed amount.

A **devise** is a gift under the terms of the will of real property. Real property consists of land and buildings and is usually known as real estate.

The **residue** or residuary gift is a gift of anything not specifically disposed of in the will. The importance of the residuary clause will be discussed later.

A testator can indicate specific types of gifts through the will. For example, a farmer may want his son to receive a certain piece of land. Without specific directions outlined in the will, the land may not pass to that son.

The second reason for having an up-to-date will is that a will names an executor, who acts as the personal representative of the testator to handle the administration of the estate. He is responsible for collecting the assets, paying the debts, ensuring that the will is probated and distributing the assets to the beneficiaries. A more complete discussion of qualities a farmer should examine when naming an executor and the duties and responsibilities of an executor is included later.

A third reason for preparing a will is that it is very inexpensive compared to the problems which could result from not having one. In most cases, the legal fee for preparing a simple will is seventy-five to one hundred dollars ($75 - $100). Often, potential income tax problems as well as other legal costs are avoided by having a will. Having a will saves a great deal of time, inconvenience, and money when the estate is being distributed to the beneficiaries. It also allows the estate to be distributed more quickly and efficiently. The small cost of having a will prepared can save much inconvenience and expense to the family and other beneficiaries of the estate.

A fourth reason for preparing a will is that a will can be a convenient place to deal with the guardianship of underage children. A guardian is a person or persons whom the testator feels is capable of and willing to accept responsibility for underage children. It should be stressed that the nomination of the guardian should be discussed at length with the person whom you have selected prior to the drafting of the will. Accepting the guardianship of children is an important responsibility and the person selected should agree to that responsibility.

Dying Without a Valid Will

Some people feel that if they die without a will, all their estate automatically goes to their spouse or children. This is not always the case. In British Columbia, if you die without a will, you are said to have died intestate. If a person dies intestate, many problems can arise and government legislation determines how the estate is to be divided. The **Estate Administration Act** in British Columbia outlines how the estate is to be distributed if someone dies without a will. Usually the next of kin of the deceased must apply to the courts to be appointed as the administrator of the estate. If no decision can be made as to who is to perform the duties of the administrator, the Official Administrator for the territory of British Columbia in which the deceased lived may be appointed as the administrator of the estate. An administrator is required by law to notify the Public Trustee when any minor child or mentally disordered spouse or child of the deceased survives. The Public Trustee is concerned with protecting the interest of the minor or mentally disordered person, including making a claim for a share of the estate in accordance with legal and moral precedent. If an Official Administrator

is appointed, the estate normally takes longer to administer.

When a person dies intestate, the legal and accounting fees are usually higher. In some cases where children are involved, the administrator is required to post a bond. Also, without a will your children may not end up with the person you intended to act as a guardian.

The following illustrates how property is distributed according to the Estate Administration Act in British Columbia.

1. A Married Man With Children:

The following rules apply to both married men and women; however, only the male example is used.

a) If a married man dies without a will leaving a widow and one child surviving him and the net value of his estate does not exceed $65,000, his entire estate goes to his widow. If his estate exceeds $65,000, the first $65,000 goes to his widow and the residue of his estate is divided equally between the widow and the child.

b) If a married man dies without a will leaving a widow and more than one child surviving him and the net value of his estate does not exceed $65,000, his entire estate goes to his widow. If his estate exceeds $65,000, the first $65,000 goes to his widow. Any amount over this $65,000 is divided up with two-thirds (2/3) going to the children and one-third (1/3) to the widow. If there are three children, the widow receives one-third of the residue of the estate over $65,000 and the balance is divided equally among the children (ie. 2/3).

c) Any child or children of a deceased child would be entitled to the share which the parent would have received if living by virtue of the division under paragraphs a) and b) above.

"Net-value" in the above means the value of an estate after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

Another point to be noted in the case of married spouses is that in the case of an intestacy, a separation immediately preceding the death will usually act as a bar to the separated spouse receiving anything from the estate. In this case, the separation must be for not less than one year where the parties intended to live separate and apart and had not during that period lived together with the intention of resuming cohabitation.

2. An Unmarried Man or Woman:

If a person who has not been married dies without a will, his/her entire estate can be distributed equally among the next of kin in the class or degree closest in blood relationship. There are a number of different degrees or classes of beneficiaries. If only one heir is living in the closest blood relation class, he/she is entitled to the entire estate; none of the relations in the subsequent classes receive any benefit from the estate of the deceased.

3. A Widower or Widow With Children:

a) If a widower or widow dies without a will, leaving only one child surviving, such child receives the entire estate.

b) If a widower or widow dies without a will, leaving more than one child surviving, the entire estate is divided equally among those children.

c) The child(ren) of any deceased child in either (a) or (b) receives the share which the parent would have received if living.

4. A Married Man Without Children:

If a married man dies without a will and his widow survives him but there are no children, the entire estate goes to the widow absolutely.

5. A Married Woman Without Children:

If a married woman dies without a will and her husband survives her but there are no children, the entire estate goes to the husband absolutely.

6. A Widower or Widow Without Children:

Where a widower or widow dies without a will or without children, his/her entire estate is distributable as set forth in the distribution schedule for an unmarried man or woman.

Degrees of Classes and Their Priority as Claimants on the Estate of Deceased Persons:

a) Wife or husband, and children, if any, as above.

b) Father and mother, or survivor.

c) Brothers and sisters, and children of deceased brothers and sisters per stripes.

d) Living nephews and nieces equally.

e) Other degrees of relationship determined through the nearest common ancestor.

7. Common-Law Spouses and Illegitimate Children of the Intestate:

Provisions are made in the **Estate Administration Act** to provide for the common-law spouses and illegitimate children of a person dying without a will. It is very important to note the definition of these two terms for the purposes of this Act.

a) Common-law Spouse means a person who has lived and cohabitated with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding his death.

b) Illegitimate Child means a child born out of wedlock and has not been legitimized by operation of law, and who was under the care, control, maintenance or protection, either physically or financially, of his father for a period of not less than 1 year immediately preceding his fathers' death.

Where a person dies without a will and a common-law spouse or illegitimate child survives him, the court may order that there be allotted for the support, maintenance and benefit of the common-law spouse or of the illegitimate child, or both, so much of the net real or personal estate, or both, of the intestate as the court sees fit.

An application for this type of relief must be made to the court by the common-law spouse, the administrator of the intestate's estate, the illegitimate child, or by a person acting as guardian.

The most important point to note here is that this application must be made within 6 months after the date on which administration of the estate was granted.

Changing or Revoking a Will

A will can be changed or revoked at any time prior to the death of a testator. As circumstances change, the testator should make changes to the will to ensure that it is up to date.

A will may be revoked by any of the following:

1. Drafting a New Will:

A testator may revoke a will by drafting a new one. Most wills contain a clause which revokes all wills prepared prior to that. If more than one will exists, as a general rule, the will with the latest date is the one which is probated.

2. Marriage of the Testator:

If a testator marries, the will in existence is automatically revoked unless it was prepared in contemplation of that particular marriage.

3. Revoking the Old Will:

If a person indicates in writing his intention to revoke a will in accordance with provisions of the **Wills Act**, it must be signed by the testator in the presence of the witnesses.

4. Destroying the Will:

The burning, tearing or deliberate destroying of the will by the testator, or the destroying of the will by a person in his presence and under his direction, revokes the document. The act of destroying the will must be deliberate; it cannot be accidental.

5. Divorce or Judicial Separation:

A divorce does not automatically make a will void. The Wills Act provides that where a testator gives an interest in property to his spouse, appoints his spouse executrix or trustee, then, unless the will says otherwise, the gift or appointment is terminated and the will takes effect as if the spouse had predeceased the testator upon the happening of any of the following events:

a) where the court, upon application by one or both of the spouses, has ordered a judicial separation. This is common practice where a party does not wish to continue to cohabit but does not, because of religious or other reasons, wish to obtain a divorce.

b) the marriage is terminated by a decree absolute of divorce, or

c) the marriage is found to be void or declared a nullity by the court.

This situation could occur where the parties had participated in a form of marriage that is not recognized by law or where they had gone through the formalities of a legal marriage but did so not with intention of remaining married but for some other motive.

In other words, a decree absolute of divorce or a judicial separation has the effect of cutting off the spouse if he/she is named in the will. Otherwise the will has the same effect and legality as the testator originally intended.

It should be noted that a separation agreement made between the spouses on their own, and without the intervention of the courts (ie. something other than a formal judicial separation) is not covered by this section of the Wills Act and the spouse in that situation would still benefit under the will. As well, what might occur is that a spouse will sue for divorce, obtain a decree nisi of divorce (preliminary divorce decree) but neglect to obtain a decree absolute (final divorce decree) which they are entitled to do after 3 months. Legally, until the decree absolute is obtained, they are not divorced for the purposes of the **Wills Act** and the "ex-spouse" might still benefit under the will.

The most common method of revocation is the making of another will containing a clause revoking prior wills. The will must of necessity be dated, signed, and witnessed. A will which does not contain a clause revoking earlier dispositions would still revoke it to the extent of any inconsistencies, or if it purported to dispose of all of the testator's property.

If only a small change is necessary in a will, a **codicil** can be added to the existing will. A codicil is a document in the form of a will that amends the original will. A codicil can be viewed as a supplement to the will and, by its terms, adds, subtracts or changes some part of the will to which it is attached. A codicil must be executed in the same manner as a will, with the testator signing in the presence of two witnesses.

Where a testator neglects to attach a codicil but instead simply crosses out parts of the will and/or adds new dispositions at the bottom of the will, problems occur. Generally, no effect can be given to any disposition or direction that is underneath or which follows the signature.

A will should be reviewed continually and changes made when changes in legislation occur or new legislation is introduced. Other changes like a change in marital status, addition of children, a change in the organization of the farm business or a change in the type of assets held by the farm should signal a review of the will.

Selecting the Executor

One of the main reasons for preparing a will is to designate a person to act as an executor. When a male is selected, he is called an executor and when a female is selected, she is called an executrix. For simplicity, the following discussion will refer to the executor.

An executor is a person designated in the will to take title to all assets of the deceased, pay all liabilities of the estate, make sure the will is probated and distribute the assets to the beneficiaries of the estate. If deemed advisable, more than one executor can be appointed; in this case they are called co-executors.

The testator should give much thought to the selection of the executor of his estate. The executor will be personally liable for any loss caused to the estate if the duties and responsibilities of executing the estate are not met. The testator is not bestowing any honour by appointing someone to be the executor of the will; rather, they are assigning a very onerous responsibility. Once the selection has been made, the matter should be discussed with the person or persons whom you have selected to be the executor(s). The testator should try to select someone who is familiar with his affairs to ensure that the estate is settled as quickly as possible. The person selected should be trustworthy and young enough to outlive the testator. It is also wise to have at least one executor residing in the province of the deceased. This will minimize time, travel and administration costs in probating the estate. In many instances, next of kin or beneficiaries of the estate are the most likely people to select as executors of the estate.

It is also advisable for the testator to provide an alternate executor who can take over in the event of a common disaster, or the named executor has died or refuses to act.

The services of a trust company should be considered in some instances to act as an executor or co-executor. Trust companies are experienced in these matters and can offer assistance (for a fee) and advice on such items as investing assets of the estate as well as administrative and tax problems.

Where the farm assets are substantial, held as a partnership or corporation, or where there are significant debts outstanding, the layman will generally be ill-equipped to act as executor without professional or legal advice. For those reasons, the testator whose farm holdings are significant or complex should make the necessary arrangements with his lawyer or with a Trust company.

An executor is entitled to a fee for his services. In British Columbia the Trustee Act provides that an executor

may be allowed a fee not exceeding five percent (5%) of the gross aggregate value, including capital and income, of all the assets of the estate and an annual care and management fee not exceeding .4% of the average market value of the assets where a trust arrangement exists. To simply probate the estate a lawyer will usually charge up to 2% of the estate. Where the will is relatively simple and the assets and liabilities of the estate are not complex, a person may probate a will without a lawyer. Specific forms must be carefully filled out. This can be done with the help of "how to" books.

Powers and Duties of the Executor

The executor derives his powers directly from the will. The formal procedure called probate confirms the official appointment of the executor by the courts. The following are some of the main powers and duties usually described in the will.

The executor should arrange to examine and study the will as soon as possible after the death of the deceased. He should study the will to determine if any special duties are required of him immediately. He should meet with family members to discuss terms and conditions of the will as well as obtain a lawyer to perform the various legal services required.

Wills often contain the testator's wishes concerning funeral arrangements, arrangements which might conflict with the wishes of the surviving spouse. The executor, and not the surviving spouse, has the right to determine the place and manner of burial. Directions contained in the will with respect to the disposal of the testator's remains are not legally binding. Directions in the will with respect to funeral arrangements that are objectionable and repugnant to the members of the testator's family may be omitted from the probate (so long as the will is probated before the funeral). It is better to put directions about funeral arrangements in a memorandum to be read on the testator's death, as wills are often left unread until after the funeral. Where no provisions are made by the testator concerning the funeral, the family will make the necessary arrangements. In some cases, the executor also has the power to arrange and pay for burial arrangements for the deceased.

It is the responsibility of the executor to take an inventory of the assets of the deceased. In the case of farmers, he must ensure that the farming business continues to operate and function smoothly. If there are on-going business transactions to perform, like selling grain or cattle, these are his responsibilities.

The executor must arrange to have the will probated by the courts. Probating a will means that the court confirms the validity of the will and the appointment of the executor is made.

The executor is required to notify the Public Trustee when any minor child or mentally disordered spouse or child of the deceased survives, whether or not this person is left anything in the will. The executor should then arrange to give notice to all the creditors of the estate. A notice of his appointment as executor should be given to the bank of the deceased and an account in the name of the estate of the deceased should be opened.

The executor must then assemble the inventory and take custody of the assets. Once the executor is appointed, he becomes the legal owner of the assets of the estate until it is distributed to the beneficiaries. A statement of affairs of the deceased should be prepared listing all the assets of the estate as well as the debts to the various creditors. Life insurance and other insurance claims should be filed on behalf of the estate, and pension and other death benefits should be applied for. Any business arrangements like leases, contracts, farm companies, etc., should be studied and documented.

A complete review of the financial records of the deceased should be undertaken to determine any business interests which may affect the estate. All farm income and expenses for the year of death should be documented and the taxable position of the estate as well as the beneficiaries should be assessed. Prior years' tax returns should be studied and a competent accountant should be employed to provide tax planning advice for the estate and beneficiaries as well as assist in preparing the required income tax returns for the estate. This may involve gathering information to establish a valuation day value for capital gains purposes.

During the year of the death, the executor must decide if one or two tax returns should be filed for the estate of the deceased person. He is responsible for determining a fiscal year for the estate as well as filing tax returns during the period of administration of the estate. He is responsible for filing the final tax return for the estate which may include capital gains, value of rights or things and other taxable items.

During the period of administration of the estate, the executor is responsible for collecting all farm receivables and other monies which are due to the estate. He must obtain court authority to pay support allowance to the widow and children of the deceased, if required. He must estimate cash requirements to pay debts and, if need be, he should determine the assets that are to be sold to pay these debts. He must also deal with the non-probate items of the estate such as property held in joint tenancy and some types of insurance which do not go through the probate procedures. In the case of property held in joint tenancy, the property can be transferred automatically to the surviving joint tenant, as the will has no jurisdiction over this property, as it does not constitute part of the estate.

Each claim on the estate by a creditor must be examined by the executor to determine its reasonableness and validity. If there are any lawsuits brought against the estate, the executor must employ legal counsel to deal with these situations. The executor, through legal counsel, may file all necessary petitions and detail accounts of the estate of the deceased with the court.

Once the executor has filed all the relevant documents with the court and the final release is given by the court, the estate can be distributed to the beneficiaries according to the terms and conditions outlined in the will. The final accounts for the administration of the estate must be prepared and submitted to the court as well as the beneficiaries. This should show all assets, income and disbursements of the estate.

The executor should then obtain a release from the beneficiaries of the estate and a discharge from the court must be obtained.

Should You See a Lawyer to Prepare a Will?

Definitely! The best qualified person to prepare a will is a lawyer. While there is no legal requirements that a lawyer prepare a will, it is advisable to have a lawyer prepare your will.

The use of a lawyer in preparing a will can result in potential problems being resolved prior to the death of the testator. The cost of having a lawyer prepare a will is minimal compared to the potential inconvenience, time loss and tax costs which could result from not having a will.

Farmers should do some preparation prior to visiting the lawyer. A farmer should have a complete list of his assets and liabilities as well as an idea how he wants his estate distributed, who he wants to name as executor and so on. Appendix B provides a worksheet that can be used to summarize the information needed for a lawyer to prepare your will.

Clauses to be Included in a Will*

It is important for the testator to outline very precisely how he wants his estate to be distributed after his death. Wills should be prepared to suit an individual's own situation. The following list outlines some of the clauses that should be considered when preparing a will.

1. Date of Will:

The date of the will and the complete identification of the testator should be given. A domicile clause is recommended which gives the address of the testator.

2. Revocation Clause:

A revocation clause to cancel previous wills or codicils.

3. Executor Clause:

A clause in the will should provide for the appointment of an executor, co-executor or alternate executor.

4. Payment of Debts:

The testator should give instructions as to what assets should be used to pay debts. In most cases, this clause provides the executor with broad powers to encroach on any assets of the estate to pay the debts. For example, the testator might instruct the executor to use current assets like cash and grain to pay debts rather than selling the farm real estate.

5. Distribution of the Estate:

The testator must outline how he wants his various types of assets distributed. When a testator is leaving specific gifts to beneficiaries, these gifts must be described in sufficient detail to enable the executor to identify that particular gift.

6. Residue Clause:

A residue clause should be included to indicate how property not specifically mentioned in the will is to be distributed. The importance of a residue clause cannot be over-emphasized. If this clause is not included, a portion

* Information from Farm Estate Planning, Saskatchewan Department of Agriculture and Information on Wills, James G. Hannah, Manitoba Department of Agriculture.

of the will could be declared intestate because no beneficiary for the residue assets is named.

7. Guardian for Minor Children:

This clause is important if minor children are involved. The consent of the individual should be obtained to ensure he is willing to take the responsibilities.

8. Limited Survival in Case of Common Disaster:

A common disaster occurs when two people die at the same time, or in circumstances where it is not known which person died first. In such cases, it is presumed that the older person died first. It is possible that the main beneficiary may outlive the testator for a short period of time. To guard against the possibility of having to probate two wills, a limited survival clause should be included. This clause states that the main beneficiary of the will must outlive the testator for a certain period of time. The time period usually stated in most wills is thirty (30) days. If the beneficiary does not survive the deceased's stated time period, the estate is then left to other beneficiaries. An example of this would be, "I John Doe, give all my estate to my wife, Mary Doe, but if my wife predeceases me or dies within thirty (30) days of my death, then I bequeath all my estate to my brother, Bob Doe."

9. Life Estate (Trust Wills):

If an estate is relatively large, a trust will may be considered whereby a testator gives a specified person a life interest in a certain property, and then, after that person dies, the property is transferred directly to another party. For example, a husband could give his widow the right to possession of their farm while she lives or to receive a rental, and direct that, after she dies, the farm is to become the property of their son.

A trust will avoids the administering of two estates and perhaps double taxation and other costs. It gives the testator means of controlling his estate after his spouse's death and ensures that no children will be left out of the estate should the spouse remarry. It is particularly attractive in the situation where the farm has traditionally been kept in the family and the testator wishes to ensure that his underage children will eventually obtain title to it.

Trust wills have certain disadvantages. The income from the property left in trust may not be sufficient to maintain the widow over a long period of time. Certain assets such as cattle, grain, feed and machinery do not lend themselves to life estate provisions. Unless care is taken in drafting the life estate clause, it could render undue hardship on the widow. It could prevent her from using cash, grain and cattle until actual income is received. This can be avoided by giving the executor the power to encroach on capital if the need arises. It is recommended that much thought be given to setting up a trust as, in many cases, trusts are not advisable for farm situations.

It is recommended that legal counsel be obtained in order to understand the implications of a trust.

10. Education Clause:

When there are children of varying ages and education, an equal share to each child at the time of the testator's death may not be fair. Some children may have been educated at the testator's expense but not others. To make the distribution fair, the testator could elect to hold the estate in trust until the youngest child reaches a specified age. If necessary, income and capital of the estate could be used to educate such children. The balance remaining would be divided among the children in equal shares.

11. Beneficiary Borrowing Clauses:

If an estate is held in trust a clause can be added which gives the executor the power to advance money for education purposes to any child reaching a specified age. The sums advanced would be charged against the child's future share of the estate.

12. Deceased Beneficiary Clauses:

In some cases, a child of the testator may die before becoming entitled to share in the estate. The bequest to such a child does not lapse if that child has children. It is distributed to that child's children.

13. Witnesses:

Two witnesses to the formal will are required. These witnesses should not be beneficiaries of the estate or spouses of beneficiaries, as this disqualifies them from receiving their share of the estate. The will is valid except for these bequests to the witness.

Beneficiaries of Interests in Funds or Plans: Designation by Will

With the advent of tax shelter savings plans as well as the situation where the farmer holds down a job off the farm, the necessity of naming beneficiaries becomes all the more important. Some plans allow a beneficiary to be named in the plan itself while others allow the beneficiary to be named in the will. The testator should always read the plan carefully in order to determine how the beneficiary is to be named. Broadly speaking, the rules for the most common types of plans are as follows:

a) Private Life Insurance Policy:

Generally, the holder of the plan may name the beneficiary in the life insurance policy itself or in the will. The insurance company should always be advised of any change in the named beneficiary.

b) Accident and Sickness Insurance Policies:

Generally, the beneficiary may be named in the will or in the policy so long as the particular policy allows a beneficiary to be designated, unlike in life-insurance policies where the insured person can name a beneficiary in the policy without the necessity of examining it to see if such a designation is allowed.

c) Employment Benefit Plans:

Informal designations of beneficiaries in employee pension, retirement or profit sharing plans may be made if the documents permit it. The nomination merely needs to be in writing and signed by the employee. This form of designation is not affected by a will made after the designation, and the employee may only revoke or alter it in the manner permitted by the plan. Hence, the original designation may be made in a will if the plan permits designations in wills. Any subsequent redesignation or revocation, however, must be made in a will. The participant in an employee benefit plan has fewer rights than under the insurance plans previously discussed.

d) Registered Retirement Savings Plans (RRSP's):

Subject to the rules of the plan, a designation of a beneficiary may be made either in a declaration signed by an annuitant (holder) or made in a will.

If an annuitant wishes to change or revoke the designation at a later time, he may do so and in the form of his choice. An annuitant under a retirement savings plan registered under the Income Tax Act has broader rights to designate a beneficiary than a participant under an employment pension plan.

e) Registered Home Ownership Savings Plan (RHOSP):

A contributor to an RHOSP may name a beneficiary of his funds in the plan itself or by a will. There is some question as to whether or not someone other than a spouse can be named as beneficiary. The holder of this type ofplan is advised to consult a lawyer.

Where the beneficiary is designated in the plan itself as opposed to the will, the funds do not form part of the estate and pass to the beneficiary without the necessity of waiting for the probating of the will. Where a testator chooses to designate the beneficiary of the plan in his will, he must still make express reference to a plan either generally or specifically.

Change of Domicile

A testator who "retires" from farming and moves to a different province while still retaining title to the farm generally does not need to be concerned about re-writing his will. A change of domicile then, does not make a will invalid. The essential validity and effect of a will in so far as it relates to an interest in land is governed by the law of the place where the land is located. The relevant law applicable to a will of and interest in "movables" (ie. things other than land) is the law of the place where the testator was domiciled at the date of his death. The **Wills Act** provides that if a testator changes his domicile after making a will, its construction would not thereby be affected. A problem could occur, however, where a testator having made a holograph will outside the province of B.C., moves to this province. In such a case, he should consult a solicitor.

Guardianship of Underage Children in the Event of Marriage Breakup

In the majority of divorce settlements, one spouse will acquire custody (care and control) of the children of the marriage with the other spouse granted generous or limited access, depending on the situation. The non-custodial parent is not the guardian of the children. The effect of ss.29 of the **Family Relations Act** is that if the parent with care and control of the children dies, the other spouse is not automatically the guardian but is obligated to apply to court to be appointed the guardian.

Another type of arrangements relating to children that has become more common with divorcing spouses is called a joint custody/guardianship agreement, where the divorced spouses share the guardianship responsibilities and custody is alternated. In this situation, where a joint guardian dies, the survivor continues as sole guardian of the children.

To sum up then, where no joint guardianship agreement exists, the spouse with custody of the children can appoint the ex-spouse to be guardian in the will. It may also be necessary however, for the survivor to apply to court to become the guardian. If another person is desired, for example grandparents, the appointment can be made in the will, however it does not preclude the ex-spouse from making an application to court to be appointed guardian.

Joint Tenancy vs. Tenancy in Common: The Effect on Wills

Most spouses hold their land as joint tenants, especially in the case of the family home. Joint tenancy means that each spouse has a one-half undivided interest in the property. In other words each spouse has a share but cannot point to it and say "that is mine". Joint tenancy gives an automatic right of ownership upon the death of the other spouse. In addition, the survivor of a joint tenant is not liable for the debts of the deceased. Thus property held in joint tenancy can not be dealt with in a will. If the testator wishes to dispose of his one-half interest in the property by will, then the joint tenancy must be first severed by deed to create a tenancy-in-common, which can be disposed of by will.

It is where the property is held as a tenancy-in-common or as sole proprietorship that a will becomes very important. Even where the family residence is in the husband's name only, a wife can ensure that this particular asset is not disposed of without her consent by filing a lien under the **Land (Wife Protection) Act**. The filing of this entry against the title removes the husband's right to freely dispose of the family residence and the lien may not be disposed of by the husband or assigned by him in his will. This act further provides for a life interest in the residence for the wife upon the death of the husband even though the husband may have had a will.

Contesting a Will

While the wishes of a testator as laid out in his will are something a court will not lightly interfere with, situations do arise where a court, upon application, may partially "rewrite" the will. Under the **Wills Variation Act**, if a testator dies leaving a will which does not, in the court's opinion, make adequate provisions for the proper maintenance and support of the testator's wife, husband, or children, the court may in its discretion, order the provision, that it thinks adequate and fair in the circumstances, be made out of the estate. Under this act, "children" includes illegitimate children. A testator still may choose not to make a provision in his will for a spouse or child if he feels he has a valid reason for not doing so. In this case, the **Wills Variation Act** allows the court to examine the wishes of the testator and the needs of the applicant (spouse, child, etc.) in coming to a decision as to whether or not to vary the will.

The **Wills Variation Act** further allows the court to refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles him or her to the benefit of an order under the act. In other words, a person who applies for relief under the act is not automatically guaranteed of relief if his conduct or character is in the opinion of the court, unacceptable.

A person seeking relief under this act must commence an action within 6 months from the date of issue of probate of the will. After the 6 month period the executor may freely distribute the portions of the estate to the named beneficiaries according to the instructions contained in the will.
In the case of an intestate leaving a common-law spouse and/or illegitimate children, they may apply to the court under the **Estate Administration Act** for relief.

In B.C. then, provision is made in the law and in the practice of the courts to prevent the situation occurring where a spiteful testator, for no valid reason, wishes to cut his family completely out of his will or leave them a bare minimum on which to subsist.

Conclusion

The most important document of any estate plan is a valid, up-to-date will because it is the only way you can direct how the assets you own are to be distributed to your heirs after your death. The importance of having a valid will cannot be over-emphasized. Further, a will should be prepared by someone who knows the implications of the various pieces of legislation affecting a will.

If you are a farmer and you do not have a will, you should have one prepared. If you do have a will, it should be revised to ensure it is current and that it achieves your intentions regarding the transfer of your estate.

APPENDIX A

GLOSSARY OF TERMS

Administrator - An individual appointed by the courts to be the personal representative and administer the estate of a person who dies without a will.

Affadavit - A sworn statement made before an authorized officer.

Annuitant - A person who receives an annuity which is a right to receive fixed, periodic payments, either for life or for a term of years.

Beneficiary - A person who receives property under the terms of a will.

Bequeath - To leave personal property to another by means of a will.

Codicil - An amenament to a will requiring all the formalities of execution needed for a will.

Custody - In family law means the care and control of underage children.

Decree Nisi of Divorce - A provisional decree of divorce becoming absolute when a motion is made to the court to have the decree made into a Decree Absolute.

Devise - A gift in a will of real property.

Domicile - That place where a person has his true, fixed and permanent home and principle establishment, and to which whenever he is absent, he has the intention of returning. A person may have more than one residence, but will only have one domicile.

Escheat - The process by which the assets of a deceased pass to the provincial government when he dies intestate.

Execution - The execution of the will refers to the signing of the document by the testator and the witnesses, in the presence of each other.

Executor - The individual appointed in a will to administer the estate of the deceased; executrix for female.

Guardian - The person charged with the duty of managing the property and rights of underage children.

Holograph Will - A will written entirely in the handwriting of the person making the will; the signature of the maker is required but no witnesses are necessary.

Intestate - Either the act of dying without a will or a person who dies without a will.

Joint Tenancy - Refers to the type of land holding wherein two people jointly share ownership and possession. The most significant element is the automatic right of survivorship so that land held in joint tenancy cannot be disposed of in the will of either of the joint tenants.

Judicial Separation - A separation of spouses by decree of the court.

Legacy - A gift of cash by will.

Letters of Administration - The appointment of the court of an administrator of the estate of an intestate person.

Letters of Probate - The official court grant confirming the validity of the will and the appointment of the executor named in the will.

Life Interest - A benefit given to a beneficiary in a will which permits the beneficiary to enjoy or have the use of some property or some amount of money for the balance of the beneficiary's lifetime only.

Litigation - A legal contest by judicial process.

Next of Kin - Blood relatives of a person dying intestate.

Per Stirpes - A method of dividing the assets of an estate so that if a member of the group amongst which the assets are being divided happens to be dead at the time of the division, the children of that deceased member will divide amongst themselves the share that their parent would have received had he or she been living.

Personal Property - All property, cash, bank accounts, stocks, bonds, machinery, livestock, with the exception of real estate and buildings, also known as "personalty".

Personal Representative - The person in charge of administering an estate, whether the executor/trix or administrator/trix.

Probate - A procedure by which a will of a deceased person is legally approved, confirmed and documented.

Real Property - Land, buildings, houses, etc.; also known as "real estate" or "realty".

Residuary Beneficiary - The beneficiary to whom the residue of the estate is left.

Residue - That portion of an estate remaining after payment of all debts and expenses and after all specific bequests and specific devises have been made.

Specific Bequest - A gift under a will of a specific item of personal property or a specific amount of cash.

Specific Devise - A gift under a will of a specific item of real property.

Tenancy in Common - Unlike a joint tenant, the interest of a tenant in common does not terminate upon his or her prior death. Thus there is no automatic right of survivorship.

Testate - Either the act of dying with a will or the name given to a person who dies leaving a will.

Testator - A man who makes a will; feminine form - testatrix.

APPENDIX B

Worksheet to be Used in the Preparation of a Will

This form is not a will. The following is some information which is required to have a will properly read.

NAME IN FULL:.....

ADDRESS:.....

OCCUPATION:.....

AGE:.....MARITAL STATUS:.....

FULL NAME OF SPOUSE:.....AGE:.....

Children's Name	Age	Marital Status
.....	.....	.....
.....	.....	.....
.....	.....	.....

EXECUTOR(S): Could be an individual(s) or trust company.

Full Name	Address	Age
.....	.....	.....
.....	.....	.....
.....	.....	.....

BENEFICIARIES: List the names of your beneficiaries and the portion of your net estate that you wish to leave to each beneficiary. Also list any specific bequests (personal property or cash) and specific devises (real property) that you wish to leave.

FULL NAME OF BENEFICIARY	RELATIONSHIP	TYPE OF BEQUEST, DEVISE OR PERCENTAGE OF RESIDUE
.....	.....	.....
.....	.....	.....
.....	.....	.....

GUARDIANSHIP: If you have young children, steps should be taken to insure for their well being, should you and your spouse die. A guardian or guardians should be named to care for your children until they reach the age of majority (legal age). Remember to secure the person's consent to act as guardian. Give full name, address, and relationship, if any.

....

COMMON DISASTER/LIMITED SURVIVAL: In those cases where the husband and wife both die as a result of a common disaster or one spouse only survives the other spouse by a short time period, it is important that further disposition of your assets be made or trusts set up for your children. In the space below, indicate your preference.

.....

.....

.....

.....

.....

.....

ASSETS: To aid in the preparation of a will. Fill in the blanks under the following categories.

REAL ESTATE:

Location	Legal Description	Market Value	Property In Joint Tenancy?
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

BANK ACCOUNTS AND TERM DEPOSITS:	Name of Bank
.....	.....
.....	.....
.....	.....

Life Insurance Company	Type of Policy	Beneficiary	Cash Surrender Value
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

Machinery and Buildings	Approximate Value
.....	.....
.....	.....
.....	.....

Livestock	Approximate Value
.....	.....
.....	.....
.....	.....

INVESTMENTS (Stocks, Bonds, R.S.P., I.A.A.C.):

Type	Approximate Value
.....	.....
.....	.....
.....	.....
.....	.....

Personal Property	Value
.....	.....
.....	.....
.....	.....
.....	.....

Other Items	
.....	.....
.....	.....
.....	.....

LIABILITIES: A list of liabilities would be beneficial when discussing the preparation of the will.

Lender	Amount Owing	Life Insured?
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

NOTE: NOT TO BE SIGNED --- THIS IS NOT A WILL!!

APPENDIX C

TESTATOR'S CHECKLIST FOR ESTATE PLANNING

The following are a number of important points to consider when making a will. It is meant to be a general list, applicable to most persons. Because no two farmers' situations are exactly the same, the farmer is urged to seek legal advice in planning for the transfer of his estate upon death. This is especially true where the farm assets are substantial or complex.

1. Existence of Will

   Every person should have a will. Given the low cost for a simple will, consideration should be given to retaining a lawyer for the purpose of drafting the will.

2. Location of the Will

   The will must be kept in a safe location. A safety deposit box is recommended. It may be left with a lawyer or with a trust company if the trust company is named as the executor.

3. Registration of the Location of the Will

   The will's location should be registered in Victoria with the Division of Vital Statistics by filing a Wills Notice (forms are available through the Supreme Court Registry).

4. Memorandum to the Executor

   A memorandum should be drawn up and signed by the testator. A copy should be left with the will and the original given to the executor to be opened immediately upon death. Among other things, the memorandum should contain the following:

   a) the location of the will, bank accounts, safety deposit box, and other places where the testator had accounts.
   b) a list of the names and locations of any insurance policies, RRSP's, RHOSP's, etc.
   c) a list of the name and location of any business assets, real estate deeds, etc.
   d) a list of the names and addresses of any creditors.
   e) a list of any debts or promissory notes owing to the deceased and the dates and locations of them.
   f) a list of the names and addresses of all beneficiaries under the will.
   g) a complete explanation of the testator's wishes concerning funeral arrangements.

The memorandum is very important as it assists the executor in speedily carrying out the wishes of the testator. Delays may often cause hardships for the family of the testator. It cannot be emphasized enough that funeral directions be contained in this memorandum.

APPENDIX D

RESOURCES AND AGENCIES

Dial-a-Law: A taped legal information service. Call 687-4680 in the Lower Mainland, or toll free 112-800-972-0956 from elsewhere in the province.

People's Law School: Offers free night classes on "Estate Administration and Probate" and publications.

Legal Resource Centre, Legal Services Scoeity, 555 West Hastings Street, P.O. Box 12120, Vancouver, B.C. V6B 4N6, offers assistance and publications.

Lawyer Referral: For $10.00 a half-hour consultation is given with a lawyer. Look in the Yellow Pages under "Lawyers".

Wills for British Columbia by International Self Help Press Ltd., 1975.

Lawyer Referral Service of The Canadian Bar Association, 202, 1148 Hornby Street, Vancouver, B.C. offers referrals to lawyers who specialize in probate and estate administration.

B.C. Supreme Court Registry: Any local registry will offer assistance in filling out required forms.

PROVINCIAL STATUTES

Estate Administration Act, R.S.B.C., 1979, C.114.
Family Relations Act, R.S.B.C., 1979, C.121.
Land Title Act, R.S.B.C., 1979, C.219.
Survivorship and Presumption of Death Act, R.S.B.C., 1979, C.398.
Wills Act, R.S.B.C., 1979, C.434.
Wills Variation Act, R.S.B.C., 1979, C.435.

BIBLIOGRAPHY

Alberta Department of Agriculture, Farm Business Management Branch, **Farm Estate Planning**, Edmonton: Queen's Printer

Anger, W.H. **Summary of Canadian Law.** Sir Isaac Pitman Canadian Ltd., 1962

Hannah, James G. **Wills.** Manitoba Department of Agriculture, 1975.

Jennings and Zuber, **Canadian Law.** Second Edition. McGraw-Hill Ryerson, 1972

Mungal, Constance. **British Columbia Probate Guide.** International Self Help Press Ltd., 1975.

Report on Interpretation of Wills, LRC. 58 Law Reform Commission of British Columbia, November 1982.

Report on Presumptions of Survivorship LRC 56. Law Reform Commission of British Columbia, October 1982.

Report on The Making and Revocation of Wills LRC 52. Law Reform Commission of British Columbia, 1981.

Saskatchewan Agriculture, Farm Management Section, **Estate Planning for Farm Families.**

Solicitor's Considerations for Family Law Lawyers CLE, B.C. 1983.

Wills & Estates, Vancouver People's Law School, Vancouver, B.C., 1981.

Wong, Steven G. **Wills for British Columbia.** International Self Help Press Ltd., 1975.